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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JERROLD ZIMAN and ELLEN ZIMAN,
Petitioners,

v.

THE STATE OF NEW YORK and the
NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,
Respondents.

and

JERROLD ZIMAN and ELLEN ZIMAN,
Petitioners,

v.

THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1984 Jerrold and Ellen Ziman purchased a small Greenwich Village brownstone in New York City, intending to restore it into a single-family home for themselves and their two children. The building contained three occupied rent-controlled units. Evictions of tenants in such units are severely restricted under the state rent control laws, but at that time a statutory exception allowed eviction if the building's owner sought to personally occupy the units. The Zimans promptly filed their eviction applications under this provision. However, five months after they bought their house a new state law was enacted that barred their owner-occupancy evictions.

In 1992, after more than seven years of legal battle, the Zimans finally succeeded in evicting their tenants on another ground—financial hardship. The following questions are presented:

1) Whether the Zimans' due process rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated when they were prevented from rightfully evicting their tenants for a period of over seven years, due to the new state law and to the state housing agency's lengthy mishandling of their eviction applications.

2) Whether the Zimans suffered a taking of their property by New York State when they were illegally barred from evicting tenants from their intended home, especially given that both their right to evict and their financial hardship were eventually affirmed by the state's highest court.

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PETITION FOR A WRIT OF CERTIORARI

Jerrold and Ellen Ziman petition this Court for a writ of certiorari to review the ruling of the New York State Court of Appeals, which dismissed their appeal and left standing a lower court ruling denying their constitutional due process and takings claims.

DECISIONS BELOW

The first decision in this case was issued by the New York State Supreme Court in 1995 under the caption *Ziman v. Division of Housing and Community Renewal,*

No. 113700/93 (N.Y. County, Crane, J., May 10, 1995). The decision, which is unpublished, is set forth in the Appendix at 13a. A second lower court decision, also unpublished, was issued by the New York State Court of Claims in 1996. *Ziman v. State of New York*, Claim No 92736, App. 6a. These two decisions were consolidated on appeal by the New York State Appellate Division, which affirmed them in an opinion issued in 1997. App. 4a, 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept. 1997). The Appellate Division subsequently denied the Ziman's motion for leave to appeal to the state Court of Appeals. App. 2a. The Zimans then filed a similar motion with the latter court, which was also denied. App. 1a, 90 N.Y.2d 808 (1997).

JURISDICTION

The order of the New York State Court of Appeals denying the Zimans leave to appeal was issued on September 18, 1997. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution reads in relevant part:

> "No person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation."

The Fourteenth Amendment, Section 1, reads in relevant part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

The state law which barred the owner-occupancy evictions sought by the Zimans is Chapter 234, Laws of 1984 (known as the Twenty Year Law), set forth in pertinent part at App. 22a. The state regulation dealing with owner-occupancy eviction 9 NYCRR § 2204.5(a), as altered by the 1984 state law, is set forth at App. 25a.

STATEMENT OF THE CASE

At issue in this case is the right of a family to make their house their home. When Jerrold and Ellen Ziman bought their Greenwich Village townhouse, New York State law permitted them to evict their rent-controlled tenants so that they and their children could fully occupy their house. Five months later, however, the law was amended to bar the very owner-occupancy evictions that the Zimans had counted on in buying their home.

The Zimans subsequently engaged in a lengthy and torturous series of legal battles to evict their tenants on other grounds. They filed eviction applications based on financial hardship with the State Division of Housing and Community Renewal (DHCR), which spent two years processing the applications before deciding to reject them. Its reasoning, that a landlord seeking owner-occupancy was automatically ineligible to claim financial hardship, was ultimately rejected by both the Appellate Division and the state Court of Appeals. Both of these courts ruled that the Zimans had clearly demonstrated hardship.

By the time the Zimans' last tenant finally left in 1992, under threat of forcible eviction, nearly eight years had passed since they had first bought their house. The Zimans then filed suit for damages against the State and DHCR. The Zimans argued that the huge delay in their ability to evict their tenants, which was triggered by the retroactive destruction of their owner-occupancy rights and which was then exacerbated by DHCR's mishandling of their applications, violated their due process rights and constituted a taking of their property. The state courts rejected both claims.

These rulings left the Zimans with no redress for a seven-year ordeal in which they were forced to act as landlords, under the sort of occupational duress which this Court has characterized as a constitutionally "startling innovation". *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). They received absolutely

no compensation for the huge delay that they endured in being able to exercise a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally". *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 876 (1983) (Rehnquist, J., dissenting from dismissal of appeal), *cited with approval* in *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992). For others in their position in New York City, these rulings destroy the fundamental right to make one's house one's home. And for landlords living under rent control regimes elsewhere, these rulings undermine a basic property right.

A. Statement of Facts

In February, 1984, the Zimans bought a small, 200-year old townhouse in Greenwich Village, planning to restore it to its original condition as a single family home for themselves and their two young children. App. 14a; *see also Ziman v. DHCR*, 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), (hereinafter "*Ziman I*"), *aff'd*, 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990).[1] At that time, the house had been divided into seven tiny apartments and contained three rent-controlled tenants. *Id.* The Zimans planned to use the owner-occupancy eviction provision of the rent control law to remove these tenants, so that their own family could fully occupy the house. They promptly filed eviction applications with DHCR on this ground. App. 14a.

The law at that time provided for eviction certificates to be issued when the

> "landlord seeks in good faith to recover possession . . . because of immediate and compelling necessity for his own personal use and occupancy or for [that] of his immediate family . . . ." N.Y.C. Admin. Code

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[1] As described at page 6 below, in *Ziman I* the petitioners succeeded in overturning DHCR's refusal to grant their hardship-based eviction applications. The *Ziman I* decisions are not before this Court for purposes of review, but do set forth background facts that this Court may find useful.

§ Y51-6.0(b)(1), subsequently recodified as 9 NYCRR § 2204.5; *see* App. 25a.

Five months after the Zimans bought their house, however, in July, 1984, the State amended this provision to prohibit owner-occupancy evictions of tenants who had lived in their buildings for more than 20 years. Ch. 234, Laws of 1984 (known as the Twenty Year Law); *see* App. 22a. This amendment took effect immediately upon passage. *Id.* at section 4. One of the Zimans' tenants qualified immediatetly under the 20-year criterion, and a second tenant qualified during the course of the subsequent proceedings. Their third tenant died in 1987, at which point the Zimans gained access to his apartment. App. 14a; *Ziman I*, 153 A.D.2d at 490, 544 N.Y.S.2d at 148.

The Zimans' eviction applications were thus blocked by the Twenty Year Law even though they had been filed months before the law's enactment.[2] The Zimans filed new eviction applications in August, 1984, based on their inability to make an 8 and ½ percent return on the assessed value of their property. App. 14a.

DHCR conducted two lengthy audits of the Zimans, both of which confirmed their inability to make this minimal return on their house. App. 14a. Despite these findings, two years later, in 1986, a DHCR administrative judge ruled that the Zimans could not utilize this hardship provision even though they met its criteria, because their motivation was not hardship but owner-occupancy. App. 14a.

In short, nearly two years after accepting the Zimans' hardship applications, and after subjecting them to two

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[2] Prior to its amendment, the owner-occupancy eviction law would still have required the Zimans to show an "immediate and compelling necessity". The Zimans had documented the unsafe conditions under which they were living in their owner-occupancy eviction applications. Appellate Division, Record on Appeal below 74-80. In their rulings below, both trial courts agreed that the new Twenty Year Law "prevented" the Zimans from obtaining their owner-occupancy eviction certificates. App. 7a; App. 14a.

extensive audits on whether they met fact-based criteria for financial hardship, DHCR rejected the applications on the basis of a threshold legal issue that could have been raised at the very outset of the proceeding.

The Zimans challenged DHCR's decision. It was upheld by a state trial court, but in 1989 the Appellate Division overturned that ruling, holding that the rent control law's hardship provision was available to the Zimans and that they met its criteria regardless of their intention to personally occupy the units. App. 15a; *Ziman I*, 153 A.D.2d 489, 544 N.Y.S.2d 148. The Appellate Division did not merely order DHCR to reconsider its decision; it affirmatively "directed [the agency] to issue the requested certificates of eviction", "since there is no question that petitioners meet the hardship requirements . . . ." 153 A.D.2d at 489, 491; 544 N.Y.S.2d at 148, 149.

Five years had now passed since the Zimans' filing of their hardship applications.

The Appellate Division ruling was upheld unanimously by the Court of Appeals in May, 1990. *Ziman I*, 76 N.Y.2d 721, 557 N.Y.S.2d 876. Like the Appellate Division, the Court of Appeals expressly noted that there was "unrefuted evidence of hardship" and that therefore the agency had been properly ordered to grant the Zimans' application. *Id.*

Despite this mandate, DHCR withheld the eviction certificates for over four months. As if to draw out the Zimans' ordeal as long as possible, DHCR insisted on waiting until the Court of Appeals denied a motion to reargue filed by the tenant-intervenors. App. 7a; Appellate Division, Record on Appeal below at 114-15, 176 (hereafter referred to as Record Below). By the time the eviction certificates were issued in October, 1990, more than six and one-half years had passed since the Zimans had first filed their eviction applications.

The Zimans now faced a three month waiting period before they could even begin court action to remove their

tenants. They won judgments of possession in July, 1991, and then had to wait another six months before they could execute their warrants of eviction. Their last tenant did not leave until January, 1992—nearly eight years after the Zimans had bought their house. App. 15a.

Throughout these eight years, the Zimans were forced to live in incredibly cramped and insecure conditions in their own home. For two years, their family of four was confined to a two-room apartment of 341 square feet. This consisted of a tiny bedroom for the children, and a second room that served as kitchen, dining room and living room for the family and as a bedroom for Jerrold and Ellen Ziman. Record Below 178. When the apartment of their deceased tenant became available, the Zima's nine year old son could finally move into his own bedroom, but this was on a different floor of the house, separated from the rest of the family by a public staircase and two locked doors. *Id.*

When the Zimans first bought their house in 1984, they legitimately planned to act as landlords only temporarily, while awaiting the approval of their eviction applications. Instead, they were forced to be landlords for nearly eight years. These were years of nightmarish concerns regarding security, lack of privacy, lack of sleep, and constant fears regarding what their children were being exposed to by the behavior of their tenants and of their tenants' stream of visitors. There were drug paraphernalia in the halls, loud parties, police visits, doors broken down, and a host of other ordeals that destroyed any possibility of normal family life. Record Below 178-81. There were countless groundless complaints and acts of vandalism from hostile tenants. *Id.* 180. There was constant stress and fear over the safety of both house and family, to the point that Jerrold Ziman had to change his profession to remain near the building. *Id.*

Nearly all of this was the result of two factors. The first was the Twenty Year Law's restriction of owner-

occupancy evictions, a restriction which barred the Zimans' original eviction applications despite their legitimate reliance on pre-existing law when they purchased their house. The second factor was DHCR's egregious mishandling of the Zimans' hardship applications. The end result was that for over seven years, the Zimans were unlawfully prevented from the full possession and enjoyment of their property.

B. The Litigation Below, And The Raising Of The Federal Issues

In 1993 the Zimans filed a complaint for declaratory judgment and damages in the Supreme Court, County of New York, against DHCR and the State of New York, alleging that the government actions described above constituted a taking of their property and a violation of their due process rights under both the New York State and federal constitutions. Record Below 42; the supreme court itself characterized the Zimans as claiming "takings of property under the State and Federal constitutions" and as seeking "a judgment that their right to due process of law was violated." App. 13a.

In 1995, on cross-motions for summary judgment, the supreme court ruled against the Zimans. It held that the New York Court of Claims had exclusive jurisdiction over their takings claims. App. 13a, 16a-19a. As for the Zimans' due process claim, the court ruled against them on the basis of two previous state court cases that had rejected challenges, on both state and federal constitutional grounds, to the Twenty Year Law: *Dawson v. Higgins*, 197 A.D. 127, 610 N.Y.S.2d 200 (1st Dept. 1994), *app. dismissed*, 83 N.Y.2d 996 (1994), *cert. denied*, 115 S.Ct. 724 (1995); *Sobel v. Higgins*, 188 A.D.2d 286, 590 N.Y.S.2d 883 (1st Dept. 1992), *app. dismissed*, 81 N.Y.2d 953, 597 N.Y.S.2d 938 (1993), *leave to app. denied*, 82 N.Y.2d 655, 602 N.Y.S.2d 804 (1993). App. 19a. The court noted that even though, in

the Zimans' case, the law "was passed *after* they purchased the property", they were still able to utilize another ground for eviction. App. 19a (emphasis in original). It characterized the rent control laws as falling within the government's police powers, having a "valid public purpose of preserving affordable housing and preventing the dislocation of lower income and moderate income tenants." *Id.*, quoting *Sobel*, 188 A.D.2d at 288, 590 N.Y.S.2d at 885.

The Zimans appealed the due process portion of the decision to the Appellate Division, and filed their takings claims with the Court of Claims, citing both New York and federal law in their motion for partial summary judgment.[3] In 1996 the Court of Claims granted the State's motion to dismiss, basing its ruling on two grounds: 1) the claim was untimely; and 2) the State had not waived its sovereign immunity to such takings claims. App. 6a.

The Zimans appealed this decision as well, and the two cases were consolidated. Once again, the federal issues of takings and due process were argued extensively in the briefs.[4] In early 1997 the Appellate Division issued a two-page opinion upholding both lower court rulings. App.

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[3] *See, e.g.*, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment 13-16 (section II: "Compensation for Temporary Takings Is Required Under Decisions Of The United States Supreme Court") (Jan. 30, 1996).

[4] *See, e.g.*, the following portions of the Appellate Division Brief for Plaintiffs-Appellants (Aug. 28, 1996): 5 ("it is beyond question that the Fifth Amendment to the United States Constitution bars any state claim of sovereign immunity in takings cases", *citing First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987)); 25-27 (section III.C, "Compensation For Temporary Takings Is Required Under Decisions Of The United States Supreme Court); 28-31 (due process violation, *citing Southview Associates v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) on substantive due process, and *Textile Workers Union v. Darlington*, 380 U.S. 263 (1965), and related cases on occupational freedom).

4a. It agreed with the Court of Claims that the takings claim was untimely; like that lower court, it too nonetheless addressed the merits of the takings claim, ruling that DHCR's

> "purported delay . . . in processing appellants' applications for hardship certificates of eviction necessitated by the passage of the Twenty Year Law did not effect an unconstitutional 'taking' of property since the law advanced a legitimate State interest and appellants were not denied an economically viable use of the property . . . ." App. 5a, *citing Dawson*, 197 A.D.2d 127, 610 N.Y.S.2d 200.

The court made no attempt to reconcile this holding with the apparently contrary rulings in *Ziman I* by both it and the Court of Appeals that the Zimans had shown "unrefuted evidence of hardship". 76 N.Y.2d at 727, 557 N.Y.S.2d at 876; 153 A.D.2d at 491, 544 N.Y.S.2d at 149.

On the due process issue, the Appellate Division stated only that there was no deprivation since both the actions and laws at issue "all bore a reasonable relationship to a valid public purpose." App. 5a.

The Zimans moved the Appellate Division for leave to appeal to the state Court of Appeals. Their motion was denied. App. 2a. They then filed a timely motion with the Court of Appeals for leave to appeal to that court.[5] On September 18, 1997, that motion was denied as well. App. 1a.

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[5] The motion papers briefed a number of recent takings decisions by the U.S. Supreme Court in support of plaintiffs' contention that "[b]oth federal and New York case law make it clear that compensation is required for both temporary and permanent" takings. Memorandum In Support Of Motion For Leave To Appeal 17 (July 1, 1997).

REASONS FOR GRANTING THE WRIT

I. IN FORCING THE ZIMANS TO ACT AS LANDLORDS FOR OVER SEVEN YEARS, NEW YORK VIOLATED THEIR DUE PROCESS RIGHTS OF LIBERTY AND OCCUPATIONAL FREEDOM, CONTRARY TO DECISIONS OF BOTH THIS COURT AND THE SECOND CIRCUIT COURT OF APPEALS

New York's enactment of the Twenty Year Law forced the Zimans to become unwilling landlords, unable to go out of business. For seven years, they had to comply with countless legal requirements for rental units, ranging from building code provisions to landlord liability rules—all in a profession in which they never intended to remain, in a house which they rightfully expected to turn into a home for their family. This forced imposition of an occupation, inflicted upon the Zimans after they had bought their house and based solely on the fortuitous characteristics of their tenants, violated their right to due process.[6]

The choice to enter or leave an occupation is among the most basic decisions that a person can make. It intimately affects everything from one's daily activities to the direction and nature of one's career. In the case of the Zimans, the impact of this forced landlordship on their personal lives, ranging from their loss of privacy to their daily fears over the security of their children, was extensively detailed in the record below. See page 7, above.

The right to make choices concerning one's occupation is clearly "implicit in the concept of ordered liberty" that

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[6] *See, e.g.*, R.C. Lawrence, *Bright Lines In The Big City: Seawall, Tenant Succession Rights, And The Jurisprudence of Takings*, 91 Colum. L. Rev. 609, 651-52 (1991) ("If the owner can avoid the servitude [of landlord duties and liabilities] only by giving up title to the property, then the owner is forced to choose between an involuntary servitude and an uncompensated taking."); K. Manheim, *Tenant Eviction Protection And The Takings Clause*, 1989 Wis. L. Rev. 925, 1000-08.

is central to individual freedom. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). A requirement by the state that one remain in a specified occupation violates this liberty. In the Supreme Court's words, the

> "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Textile Workers Union v. Darlington Manufacturing Co,.* 380 U.S. at 270.

See, e.g., Frost & Frost Trucking Co. v. R.R. Commission, 271 U.S. 583 (1926) (state attempt to force common carrier status on private trucking firm violates due process). As one federal appeals court stated, "[t]here would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 867 (D.C. Cir. 1972).[7]

The Appellate Division disposed of this issue with a single sentence, declaring that the respondents' actions and laws "all bore a reasonable relationship to a valid public purpose." App. 5a. This analysis, however, totally ignored the proper framework for evaluating permit denials. The U.S. Court of Appeals for the Second Circuit has described how such claims are to be addressed:

> "In evaluating a landowner's claim that a denial of a permit for a regulated use of land offends the landowner's right to substantive due process under the 'arbitrary and capricious' government conduct theory, a court first asks whether 'an entitlement exists in

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[7] *See also Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("Inability to avoid continued service is the essential ingredient of involuntary servitude."); *United States v. Mussry*, 726 F.2d 1448, 1454 n.6 (9th Cir. 1984) ("Even though a person may come to a job voluntarily, subsequent coerced service constitutes involuntary servitude.").

> what has been applied for . . . .'" *Southview Associates v. Bongartz*, 980 F.2d 84, 101 (2d Cir. 1992), (Oakes, Chief J., concurring), *quoting RRI Realty Corp. v. Southampton*, 870 F.2d 911, 917 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989).

The Zimans obviously had a well-founded expectation that they would be able to pursue their evictions on the relatively simple ground of owner-occupancy. Even if one assumes the validity of the Twenty Year Law with respect to buildings purchased *after* its enactment, New York's after-the-fact destruction of that expectation raises serious constitutional issues. In the words of this Court:

> "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

DHCR's mishandling of the Zimans' eviction applications raises similar issues, which cannot be dismissed by vague reference to some valid public purpose. As described at pages 5-6 above, after the Zimans had spent two years undergoing two administrative audits by DHCR on the issue of hardship, an agency judge disallowed their applications on the basis of a threshold issue that should have been raised when those applications were first filed—namely, that their intention to personally occupy the house they owned somehow disqualified them from seeking hardship status. Even worse, once the state's highest court had affirmed the order directing DHCR to issue the eviction certificates, the agency still delayed doing so for four months. As petitioners argued to the Appellate Division, "four months [of DHCR's] delay are due more to malice than to mistake." Appellate Division, Reply Brief for Plaintiffs at 9 n.3.

The U.S. Court of Appeals for the Second Circuit has made it clear that due process is not satisfied by proce-

dural safeguards alone; it also entails protection from arbitrary and capricious action. The "issue of whether substantive due process protects state-created property rights is resolved by precedents in this circuit . . . ." *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995); *see also Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994) (substantive due process requires inquiry into whether there was a deprivation of a property interest " 'for an improper motive and by means that were pretextual, arbitrary and capricious . . . .' ", *quoting Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982). In *Walz*, the court ruled that there is a "substantive due process right not to be subject to an arbitrary and capricious denial of an excavation permit". *Id.*[8] Where the permit involves not the commercial right of excavation, but the much more basic right to live in the home one owns, an arbitrary and capricious delay in its issuance should be subject to no less scrutiny.

II. THE ISSUE OF AN OWNER'S RIGHT TO PERSONALLY OCCUPY HIS HOUSE IS AN IMPORTANT FEDERAL QUESTION WHOSE DISPOSITION BELOW CONTRADICTS SUPREME COURT RULINGS

A. While The Courts Below Decided The Takings Issue On Both Federal And State Grounds, The Latter Rulings Are So Untenable That They Do Not Bar This Court's Consideration Of The Federal Takings Question

The courts below clearly ruled on the merits of both the Zimans' federal due process claim and takings claim.

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[8] In contrast, the Ninth Circuit has ruled that substantive due process protections do not extend to property rights. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). The instant case presents an opportunity for this Court to reconcile these disparate approaches among the Circuits.

However, the courts also ruled that the later was time-barred under state procedural law. Normally, an independent state court ruling of this sort would prevent consideration by this Court of the underlying federal claim, because in such cases a ruling by this Court "could amount to no more than an advisory opinion". *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Nonetheless, this Court has also recognized that, under certain circumstances, such a ruling may be so untenable that Supreme Court review of the federal claim is still warranted. As this Court noted in *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958):

> "Novelty in [state] procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *See also id.* at 377 U.S. 288, 301 (1964).

Among the factors involved in assessing the state rule is the extent to which it is "reasonable . . . and clearly announced". *Henry v. Mississippi*, 379 U.S. 443, 448 n.3 (1965).

For several very compelling reasons, the rulings on the timeliness of the Zimans' takings claim fails this standard. As is shown directly below, that ruling was an unexplained creation of new law which directly contradicted the precedent on which it purported to rely.

Under New York law, a claim for appropriation of property must be filed within three years of accrual. App. 9a, citing N.Y. Court of Claims Act § 10(1). The Zimans contended that their cause of action "accrued on January 2, 1992, the date on which the last tenant finally vacated. Claimants assert that this was the date on which their damages became ascertainable and that a claim accrues when damages accrue." App. 9a. Their N.Y. Supreme Court action was filed in May, 1993, one and one-half years after that date. *Id.* The ruling in that

case, which held that only the Court of Claims could review the takings claim, was issued in April, 1995. App. 13a. At that point, the Zimans took advantage of a state statute which permits timely actions filed in the wrong court to be re-filed, within six months of dismissal, in the proper forum. New York Civil Practice Law and Rules (CPLR) § 205(a) states:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within the six-month period."

The New York Court of Claims Act requires that claims court practice conform to supreme court practice "except as otherwise provided". N.Y. Court of Claims Act § 9.9 (29-A Part II McKinney's). The Court of Claims recognized the applicability of CPLR § 205(a) to cases before it. App. 10a. Nonetheless, it still held that the action was not timely commenced, because "no claim was filed with the Court of Claims within three years of the claim's accrual." App. 11a, *citing Charbonneau v. State of New York*, 148 Misc. 2d 891, *aff'd* 178 A.D.2d 815, *aff'd*, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992) (under caption of companion case, *Dreger v. New York State Thruway Authority*).

On appeal to the Appellate Division, the Zimans made two essential points: 1) the case cited by the Court of Claims involved a failure to timely commence the originally-filed action rather than the subsequently-filed action; it thus was inapplicable to the Zimans, whose original action (that is, the one in state supreme court) was

clearly timely;[9] 2) the cited decision expressly stated that it applied only to pre-1992 actions. In 1992, the CPLR was amended with a new commencement-by-filing rule which made the applicability of CPLR § 205(a) to the Court of Claims even clearer.[10] Appellate Division, Plaintiffs Brief 9-14; Reply Brief 4-7. In the words of one noted commentary, this factor would "support a different result today on the *Dreger facts*." 7B McKinney's CPLR § 205, Supp. Practice Commentary C205:3, 1997-98 Supp. at 84.

Despite the extensive briefing on this issue, the Appellate Division devoted only one sentence to this issue, summarily reiterating the Court of Claims ruling with no

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[9] In both *Charbonneau* and *Dreger*, it was the *original* actions that were not timely commenced. These were first brought *in the Court of Claims*, where they were dismissed and became time-barred because of the claimants' failure to properly serve the Attorney-General. Unlike the Zimans case, these cases, in their original incarnations, were never "timely commenced" within the meaning of CPLR § 205(a).

This fact was explicitly noted in the lower court decisions in these cases. In *Dreger* the Appellate Division stated:

> "Since the first claim had never been properly commenced, CPLR 205(a) provided no relief to claimants and their second action was untimely." 177 A.D.2d 762, 575 N.Y.S.2d 743, 744 (3d Dept. 1991).

Similarly, in *Charbonneau* the Court of Claims stated:

> "In order for the Court to determine that CPLR 205(a) applies to the instant situation, we must determine if the original claims . . . were 'timely commenced', that is, whether the jurisdictional requirements of the Court of Claims Act were satisfied. . . . Because service was a nullity, no action had been actually commenced, and CPLR 205(a), therefore, does not apply . . . ." 561 N.Y.S.2d 876, 880 (Ct. Cl. 1990).

[10] The state Court of Appeals stated: "We have consistently held that, for purposes of CPLR 205(a) actions prior to the 1992 CPLR amendments . . . timely commencement requires literal compliance with the relevant statutes governing notice . . . ." 81 N.Y.2d at 723, 593 N.Y.S.2d at 759. Among those amendments was a change in CPLR § 304; its commencement-by-service rule was replaced by a new commencement-by-filing rule, a change which applies to Court of Claims actions.

mention of the Zimans' arguments on this point. App. 5a. This cursory ruling should not serve to preclude review by this Court of the merits of the federal taking claim.

Despite their holding that the takings claim was untimely, the state courts nonetheless did proceed to address its merits. As shown below, their treatment of the latter conflicts with decisions of this Court, of the high courts of two states, and of several federal circuit courts as well.

B. This Court's Decision In *Yee v. City of Escondido* Indicates That The Compelled Tenancies Imposed On The Zimans For Over Seven Years Constitute A Taking Of Their Property

The Appellate Division stated that the Zimans suffered no taking because the law at issue "advanced a legitimate State interest and appellants were not denied an economically viable use of the property." App. 5a, *citing Dawson*, 197 A.D.2d 127, 610 N.Y.S.2d 200. As discussed above, the court's holding on economically viable use is directly contrary to its finding of financial hardship in *Ziman I*. As shown below, the other factor cited by the Appellate Division, of legitimate state interest, cannot suffice to override this Court's rulings on the right of property owners to exclude third parties from their property.

This Court has repeatedly noted that the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). It has vigorously reaffirmed this right in contexts ranging from forced public access to private marinas (*Kaiser Aetna, supra*) to cable television boxes on apartment house roofs (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) to easements imposed upon beachfront yards (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) to municipal floodplain exactions. *Dolan, supra.*

Most importantly, in *Yee* this Court considered the application of this right to compelled tenancies. This Court held that there was no physical taking in that case because there had been no compelled tenancy:

> "At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." 503 U.S. at 527-28.

But the Court did indicate that if the law *had* compelled the landowners to rent, then it would have been unconstitutional:

> "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy." *Id.* at 528, *citing FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987); *Fresh Pond*, 464 U.S. at 877 (Rehnquist, J., dissenting).

The Zimans' predicament involved precisely this sort of compulsion. As a result of the law and agency actions here at issue, the Zimans were denied the right to exclude outsiders from the most private and intimate form of property—their own house.[11]

C. This Court Has Recognized The Constitutional Right Of A Landlord To Cease Renting Even In The Context Of Rent Control

The Appellate Division's mention of "legitimate State interest" (App. 5a) apparently refers to the general validity of rent control; in the words of the *Dawson* case cited by that court, the state has "broad power to regulate housing conditions in general and the landlord-tenant

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[11] It is noteworthy that in both *Sobel* and *Dawson*, the New York Court of Appeals declined to even review the constitutional issues raised in these cases, despite their obvious tension with rulings by this Court. 82 N.Y.2d 655; 83 N.Y.2d 896.

relationship in particular without paying compensation for all economic injuries that such regulation entails." 610 N.Y.S.2d at 205, *quoting Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

Rent control, however, does not enjoy some categorical exemption from takings law. An action which constitutes a taking in a *non*-rent control context is not magically absolved when it takes place under rent control. There is no basis for contending, for example, that a landlord's "traditional right to evict a tenant in order to occupy a rental unit personally" (*Fresh Pond*, 464 U.S. at 876) vanishes if the unit is rent-controlled.

To the contrary, this Court has made it clear that the right to exclude is as basic to rent controlled property as it is to any other. The federal Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App. § 901 et seq., on which New York's rent control statute is based, imposed rent control in federally-designated military defense areas. In rejecting a takings challenge to this act, the Supreme Court emphasized that the law did not restrict a landlord's ability to cease renting:

> "We are not dealing here with a situation which involves a 'taking' of property. *Wilson v. Brown* [137 F.2d 348 (Emer. Ct. App. 1943)]. By § 4(d) of the Act it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

The *Wilson* decision cited by the Court made this constitutional connection even clearer:

> "[T]he Act does not require the landlord to continue his property in the market for housing accommodations. . . . In accordance with this statutory provision . . . a landlord may evict a tenant whose lease

> has expired if he 'seeks in good faith not to offer the housing accommodations for rent.' *The landlord is thus free to occupy the property himself,* or devote it to some commercial enterprise, or utilize it in any other way. *This serves to emphasize that there has been no 'taking' of his property in the constitutional sense.*" *Wilson,* 137 F.2d at 352 (emphasis added).[12]

In fact, the New York Court of Appeals itself once reiterated this view, noting that

> "the Supreme Court had suggested [in *Bowles*] that there was an *absolute right* in an owner to evict tenants so as to use his property for uses not covered by the act." *New York University v. Temporary State Housing Rent Commission,* 304 N.Y. 124, 127, 106 N.E.2d 44, 46 (1952) (emphasis added).

In short, compelled tenancies of the sort suffered by the Zimans raise the most serious constitutional issues of property rights.

III. THE DECISION BELOW CREATES A SPLIT AMONG STATE HIGH COURTS ON THE ISSUE OF OWNER OCCUPANCY

The Appellate Division's cursory treatment of the takings issue stands in sharp contrast to the decisions of two other state high courts. In Massachusetts, the application of a similar retroactive owner-occupancy bar was held to be a taking:

> "Here . . . the owner purchased with the reasonable belief that Ordinance 926 conferred upon her the right to buy her unit and remain in it. If Ordinance 980 were to be applied retroactively, it would

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[12] This same absence of compulsion under the federal act was reemphasized by the Supreme Court in yet another case: "The present statute is not open to the objection that petitioners are *compelled* to serve the public . . . ." *Yakus v. United States,* 321 U.S. 414, 437 (1944) (concerning the application of the federal act to beef wholesalers) (emphasis added).

thereby interfere with the plaintiff's primary expectation concerning the use of the property. . . .

". . . The board would physically exclude her from living in her unit as owner, and would require that the unit be made available for physical occupation by a tenant. If the board were to exclude her from her property in this way, there would be a taking for which she would be entitled to just compensation." *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 861-62, 494 N.E.2d 1025, 1030 (1986) (footnote omitted).

The Washington Supreme Court dealt similarly with a local bar on houseboat evictions by moorage owners. The ordinance made it "impossible for the houseboat owner to be evicted and impossible for the owner of the moorage to use the moorage for the owner's residence." *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 386, 617 P.2d 713, 719 (1980). *See also Granat v. Keasler*, 99 Wash. 2d 564, 663 P.2d 830 (1983).[18]

In short, the decision below conflicts not only with decisions of this Court, but also with those of other state courts of last resort. Supreme Court Rule 10(b).

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[18] Both the Massachusetts and the Washington decisions involved interpretations of the Fifth Amendment. In *Polednak*, the court rested its holding on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and on *Flynn v. City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981). *See Polednak*, 395 Mass. at 861, 494 N.E.2d at 1030. *Flynn*, in turn, based its constitutional analysis solely on U.S. Supreme Court decisions. *See* 383 Mass. at 160-61, 418 N.E.2d at 339-40.

The *Kennedy* decision is based on both the Fifth Amendment and the state constitution. *See* 94 Wash. 2d at 384, 617 P.2d at 719.

IV. THE SEVEN YEAR DELAY IN THE ZIMANS' ABILITY TO REALIZE THEIR LEGITIMATE EXPECTATIONS OF OCCUPYING THEIR HOME CONSTITUTES A REGULATORY TAKING

A. The Zimans' Expectations Of Being Able To Evict Their Tenants Were Fully Legitimate

The physical intrusion suffered by the Zimans goes beyond what this Court has previously characterized as takings by physical occupation. But it is also clear that "interference with reasonable investment backed expectations" can constitute a taking of a different sort—a regulatory taking. *Kaiser Aetna,* 444 U.S. at 175.

As shown above, the right to occupy one's property is a fundamental constitutional element. Owner-occupancy eviction provisions are "founded on what is considered to be a basic right of ownership . . . ." Barr, *Guidelines For Drafting Rent Control Laws—Lessons of a Decade,* 35 Rutgers L. Rev. 723, 834 (1983).

Nonetheless, owner-occupancy rights have been steadily eroded by numerous rent control regimes. "The aggressive system of rent control makes taking units off the market illegal . . ., often bringing innocent landlords into the net woven by the law until it becomes a crime for a landlord to occupy his own apartment." R. Epstein, *The Moral and Practical Dilemmas of an Underground Economy,* 103 Yale L.J. 2157, 2172 (1994); *see also Note: Are Landlords Being Taken By the Good Cause Eviction Requirement?,* 62 S. Cal. L. Rev. 321, 347 (1988); K. Manheim, *Tenant Eviction Protection And The Takings Clause,* 1989 Wis. L. Rev. 925, 969-72.

In the case of the Zimans, their expectation was based on explicit New York law. It thus met the two key criteria of legitimacy set out in *Lucas v. South Carolina Coastal Council*: it was based on "a rich tradition of protection at common law" and it had "been shaped by the State's law of property". 505 U.S. 1003, 1016 n.7 (1992).

The Zimans' reliance on this was precisely what the Supreme Court had in mind when it noted "the importance of honoring reasonable expectations in property rights." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988). New York's "decision to arbitrarily switch back and forth" in its recognition of this right is exactly the sort of flip-flop that, in the field of takings jurisprudence, "raise[s] serious constitutional questions." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

More than seventy years ago, Justice Holmes pointed out that the Fifth Amendment's compensation requirement is intended to check "the natural tendency of human nature . . . to extend [regulation] more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1992). It was precisely this regulatory tendency that ended up swallowing the Zimans' right of owner occupancy.

B. The State's Interest In Protecting Certain Classes Of Tenants Cannot Justify The Denial Of Compensation To The Zimans

The Twenty Year Law gives special treatment to three categories of tenants: the elderly, the disabled, and long-term tenants. It was on the third basis, that of long-term residency, that the Zimans' tenants were protected. App. 14a.

The law's three categories are not inextricably entwined; the elderly and the disabled could have been protected even if the law had not covered long-term tenants. Long-term tenants, on the other hand, receive special protection even if they are healthy and rich. In evaluating New York's interest in favoring long-term tenants, the considerations involved in state protection of elderly and disabled tenants can be put aside. Viewed in this light,

there is no substantial government interest in treating long-term tenants as a special class.[14]

The Twenty Year Law's legislative history noted the difficulty of eviction for the elderly and disabled, but it was silent on why long-term tenants who are *not* elderly or disabled would face some hardship greater than other evicted tenants. According to one report,

> "[e]viction is a serious hardship for senior citizens, long term tenants, and the disabled. Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled. In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income." Memorandum of Assemblyman R.N. Gottfried, 1984 N.Y.S. Legislative Annual 109.

Another report was similarly vague on why long-term tenants needed such favored status:

> "[L]ong-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community . . . . [F]orcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community." Budget Division, Report on Bill No. 3586-B at 2 (1984).

But if New York had wished to protect elderly tenants who were "not 62 years of age", then it could have lowered the law's age threshold. If it wished to protect

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[14] The Twenty Year Law gave the Zimans' tenants a greater right to intrude on their property than that of soldiers serving their country. The Third Amendment to the U.S. Constitution states: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner . . . ." These "property-based privacy interests protected by the Third Amendment" are "recognized and permitted by society as founded on lawful . . . possession with a legal right to exclude others." *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

tenants with limited incomes, it could have adopted a financial means test. *See, e.g., Pennell,* 485 U.S. 1. Instead, New York decided to award this preferential status solely on the basis of community residence.

This Court, however, has repeatedly rejected durational residence as a basis for unequal state treatment. *See Vlandis v. Kline,* 412 U.S. 441 (1973) (rejecting higher state university tuition fees for new as opposed to established residents); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (rejecting residency requirement for welfare assistance); *Zobel v. Williams,* 457 U.S. 55 (1982) (rejecting length of in-state residency as basis for distribution of state oil royalties).

The constitutional grounds for these decisions were equal protection and the right to travel. Takings jurisprudence requires a similar inquiry into the legitimacy of the asserted state interest and of the means chosen to advance it. As the Supreme Court stated in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127 (1978), "a use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a *substantial* public purpose." (Emphasis added.)

C. In Imposing The Burden Of Housing Selected Classes of Tenants On Individuals Such As The Zimans, Based Only On The Accident of Occupancy, New York Violated The Constitutional Requirement That Public Burdens Be Borne By The Public And Not By Haphazardly Selected Individuals

Even if one assumes that New York has a legitimate interest in favoring long-term tenants, its method for advancing that interest violates constitutional requirements of fairness. The guarantees of due process and just compensation are intended to prevent individuals from being forced to "surrender to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United*

States, 148 U.S. 312, 325 (1892). The ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The New York Court of Appeals has itself recognized the fundamental unfairness of such government attempts:

> "The ultimate evil of a deprivation of property . . . under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. . . . [A]s further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding. . . . When [the socal cost is] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit." *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 596-97, 385 N.Y.S.2d 5, 11 (1976).

The Twenty Year Law operates precisely through this "cost-free" guise. It arbitrarily imposes its cost on unlucky landlords such as the Zimans—an action which, "even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan*, 483 U.S. at 835 n.4.

Regardless of how politically expedient this form of legislative legerdemain may be, it is not constitutional.

CONCLUSION

When Jerrold and Ellen Ziman bought their house in 1984, they legitimately expected to be able to use the owner-occupancy eviction law so that their family could fully occupy it as their home. New York State destroyed that expectation, and then DHCR mishandled their eviction applications. As a result, they lost the ability to make their house their home for over seven years.

The decision below, denying them compensation for this delay, contradicts basic rulings of this Court on property rights. Furthermore, it conflicts with decisions by two other state high courts and by several federal circuit courts on major issues of property rights and due process.

For these reasons, and for the other reasons set forth above, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

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